REMARKS

Claims 1-3 are amended. Claims 4-7 have been previously withdrawn. Claims 1-3 and 8-12 remain in the application.

In a previous communication dated September 7, 2005, the Applicant canceled claims 1-3 and added new claims 8-12. The new claims are similar to claims 1-3, and were added as a convenience to avoid extensive cross-outs and additions to claim 1. The Examiner indicated that claims 8-12 are directed to an invention that is independent from the invention originally submitted. Specifically, the Examiner cited the step of "providing a web of material having a locating indicia for identifying a straw pierceable portion of the pouch".

The Applicant traverses this constructive election of claims 1-3. Claim 1 included the step of "placing a locating indicia on a web of flexible moldable material." Claim 8 includes the step of "providing a web of material having a locating indicia for identifying a straw pierceable portion of the flexible pouch." The Applicant submits that there is no distinction between the step of providing a web of material having a locating indicia and the step of providing a web of material having a locating indicia. In both steps, the locating indicia is used to index the web of material between the mold elements, as described in the "positioning" step of claim 1 or "using" step of claim 8. Therefore, claims 8-12 are directed to the same invention as claim 1.

Claims 1-3 were rejected under 35 U.S.C. §103(a) as being unpatentable over Farber (4,429,828). The Applicant respectfully traverses this rejection.

U.S. Patent Number 4,429,828 to Farber discloses a plastic-coated cardboard beverage container. The wall 1 of the container includes a center layer that is cardboard 3 and outer plastic layers 2. The wall includes a circular incision 5 on the outside of the wall that is concentric with a circular incision 6 on the inside of the wall. The inside incision 6 has a larger circumference than the outside incision 5. The incisions 5, 6 are deep enough to penetrate the plastic layer to facilitate breaking of the wall with a straw along a separation interface between the inner incision 6 and outside incision 5. Farber does not include a method of forming a flexible pouch using a male mold element having a heated rod and a female mold element having a parabolic cavity, to form a dimple with a parabolic shape as disclosed by the Applicant.

In contradistinction, claim 1 as amended discloses a method of forming a beverage container having a straw pierceable dimple that includes the steps of placing a locating indicia on a web of material. The method also includes the steps of positioning the web between a male mold element having a heated rod and a female mold element having a parabolic cavity, and closing the male and female elements on a portion of the web adjacent the locating indicia. The method further includes the steps of forming a dimple in the web by heating the portion of the web of material between the male mold element and the female mold element and applying heat, so that the dimple has a predetermined width with a thickness that is less than a thickness of the web. The method still further includes the steps of forming the container with the dimple on a wall of the container projecting into the container. Claim 8 is similar to claim 1 in scope.

Farber '828 does not teach or suggest the claimed invention of claims 1 or 8. Specifically, the Farber reference merely discloses a method of forming a plastic-coated cardboard container using a material having a cardboard layer sandwiched between two plastic layers. Farber does not disclose a method of forming a beverage container using a web of flexible moldable material. Plastic coated cardboard is a rigid material, and not a flexible moldable material, as disclosed by the Applicant.

Farber also teaches a method of forming the straw pierceable portion of the container using of a hollow upper punch for forming an upper incision partially through the wall of the pouch and a hollow lower punch for forming a concentric lower incision partially through the wall of the pouch, such that the inner incision has a greater circumference than the outer incision. Farber does not disclose the step of molding a dimple having a parabolic shape by using both a male mold element having a heated rod and a female mold element having a parabolic cavity, as disclosed by the Applicant. A hollow punch that forms an incision is simply not the same as a heated rod and female mold element having a parabolic cavity. Further, the step of partially piercing the wall of the cardboard material using an upper punch and a lower punch is simply not the same step as molding a dimple in the wall of the flexible material using a male mold element with a heated rod and a female mold element with a parabolic cavity. In addition, Farber also does not disclose that the cross-sectional shape of the dimple is less than the cross-sectional thickness of the web of material. The step of cutting the material is a separating step, which is different than the step of compressing and heating the material. Moreover, the physical result obtained from performing these diverse steps is not the same. The present application does not disclose or even suggest a cutting operation to form the parabolic shape. The parabolic shape is formed through the stretching of material as a result of the application of heat and pressure.

The Examiner agrees that Farber does not disclose the step of heating the portion of the web between the mold elements to form the dimple in the web. However, the Examiner assumes that Farber does not disclose this step because the use of heating elements to form a web to a shape is old and well known in the art, and it would be obvious to one having ordinary skill in the art to substitute Farber's molding elements to "form the web into such shape by point 4 with other heated molding elements, in order to get more accurate and sharp shape on the web and shape the web with faster rates."

The Applicant submits that while the use of a heating element to form a shape is old, it would not be obvious to one skilled in the beverage container making art to substitute the punch of Farber with the heating elements of the present application to create a dimple having a parabolic shape and the dimple projects into the container. The Examiner is using the present application to make an assumption that is simply not supported by the specification of Farber.

The Examiner states that the applicant admits that Farber '828 discloses upper and lower incisions on the web (via 5 and 6). The Applicant agrees that these incisions are directed inwardly towards each other into the web of material, to form a circular incision shape on the upper and lower surface of the web. However, the Examiner states that the circular incision shape would be considered a dimple having a predetermined width with a thickness that is less than the thickness of the web, since cuts 5 and 6 form 4, which is considered a dimple with a thickness less than the thickness of the web. However, the Examiner makes a broad leap in stating that inwardly directed incisions in a wall of material form a dimple projecting outwardly. Even assuming for sake of argument that the upper incision forms one dimple into the material and the lower incision forms a second dimple into the material, this is not the same as the one dimple having a parabolic shape projecting into the container, as disclosed by the Applicant.

The Applicant submits that there is no teaching in the prior art cited by the Examiner to suggest the method of forming a beverage container having a straw pierceable dimple having a parabolic shape projecting into the wall of the container,. The art of providing a beverage container is well developed, and as such, advances are narrow, but still novel. The Applicant provides a new and novel beverage container that is easier to manufacture and open. It is respectfully submitted that the Examiner's stated conclusion of obviousness is based on speculation and hindsight reconstruction of the claimed invention from teachings in the prior art.

Therefore, it is respectfully submitted that both claim 1 and claim 8 and the claims dependent therefrom are in a condition for allowance, which is solicited. If the Examiner finds to the contrary, it is respectfully requested that the undersigned in charge of this application be called at the telephone number given below to resolve any remaining issues.

Respectfully submitted,

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DATE OF DEPOSIT December 19, 2005

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